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Martin Uchenna v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–273–10 OF 2011
ABDUL WAHAB PATAIL, AZAHAR MOHAMED AND MOHTARUDIN BAKI JJCA
30 JUNE 2014

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Evidence — Presumption — Drug trafficking — Accused passenger on express bus arrested after police found keys on person which opened lock to bag containing cannabis in luggage compartment — Accused unable to explain possession of keys — Whether trial judge correct to have presumed accused had possession and knowledge of the drugs — Dangerous Drugs Act 1952 s 37(d) — Whether possession of keys, accused's demeanour and admission his bags were in the luggage compartment pointed to accused's guilt — Whether fact accused was 'carrying' large quantity of cannabis from one place to another and could not explain action gave rise to inference of trafficking

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The appellant, a Nigerian national, who said he came to Malaysia as a tourist, was sentenced to death by the High Court after it found him guilty on two charges of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The first charge concerned 13,920g of cannabis which was found in a padlocked trolley bag while the second charge concerned 12,867g of the same drug which was found in a backpack placed next to the trolley bag. Both bags were in the luggage compartment of a south-bound express bus in which about 12 to 14 passengers including the appellant were travelling when the bus was stopped for a routine check at the Butterworth toll by enforcement officers from the police, customs, immigration and environment departments. It was the prosecution's evidence that when the officers boarded the bus to check the identity cards and luggage of the passengers and approached the appellant, he appeared to be restless and sweating and that his right hand was shivering. The appellant admitted to one of the officers that his bags were in the luggage compartment of the bus. After the passengers were ordered to remove their respective luggage from the compartment the officers noticed only the trolley bag and a backpack next to it were still within the compartment. They removed the two bags and asked the appellant whether they were his but he said they were not. A police officer's search on the appellant's person found two keys in the appellant's trouser pocket which opened the padlock of the trolley bag. The appellant was arrested and he and the seized bags were taken to the police station. At the conclusion of the trial, the High Court invoked s 37(d) of the DDA to presume the appellant had possession of the drugs. The trial judge also relied upon s 2 of the DDA to hold that the appellant's 'carrying' of such a large

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quantity of the drugs constituted trafficking as there was no explanation, nor possibility, that it was for the appellant's personal consumption. When his defence to the charges was called, the appellant in an unsworn statement from the dock denied knowledge of the drugs and contended that the keys recovered from his pocket were for a sling bag he had carried with him at the time. The appellant said the bags could have belonged to any one of the passengers, none of whom were called as witnesses. He said the only reason he was nervous or anxious at the time was because he had overstayed in Malaysia. The trial judge found the appellant's defence to be a bare denial and noted that he did not explain how the keys to the lock on the trolley bag came to be on his person. In his instant appeal against conviction and sentence, the appellant argued that the trial judge erred in finding he had exclusive possession, custody or control of the drugs as all the passengers in the bus were in equal proximity to it. He contended that the prosecution failed to show a nexus between him and the two bags.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The appellant was in possession of the key to the padlock of the trolley bag; his demeanour and conduct at the point of time was a reaction driven by guilt — he was restless, his right hand was shivering and he was also sweating. He admitted to PW6 that his bags were in the luggage compartment of the bus. That, more than anything else, spoke of the nexus between the two bags and the appellant. The totality of the evidence and the circumstances taken together irresistibly pointed to the appellant having had custody of the trolley bag and the backpack at the material time. The trial judge was correct to have invoked s 37(d) of the DDA to raise a rebuttable presumption of possession and knowledge of the drugs on the part of the appellant (see paras 17–18).

(2) The appellant was apprehended in the act of carrying the cannabis from one place to another. The amount of cannabis involved was much larger than was likely to be used for personal consumption; in any event the appellant never suggested in his defence that the drugs were for his own consumption. In the absence of any credible explanation, this fact was sufficient to lead to a strong inference that the purpose for which the appellant was in possession of the drugs was to traffick in them (see para 19).

(3) The trial court made a finding that the prosecution had proved a prima facie case after a maximum evaluation of the evidence. It was clearly a finding based on the tested testimony and credibility of the witnesses and the inherent probabilities of their evidence. The finding that the defence had failed to raise a reasonable doubt on the prosecution's case was also made after a maximum evaluation of the appellant's unsworn statement

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A from the dock as against the prosecution's case. No error of law was committed by the trial court that warranted appellate intervention (see paras 21–22).

[Bahasa Malaysia summary

B Perayu, seorang warganegara Nigeria, yang mengatakan dia datang ke Malaysia sebagai seorang pelancong, dijatuhi hukuman mati oleh Mahkamah Tinggi selepas mahkamah mendapati dia bersalah atas dua pertuduhan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pertuduhan pertama berkenaan 13,920g ganja yang ditemui dalam sebuah beg troli yang C telah dimangga manakala pertuduhan kedua berkenaan 12,867g dadah yang sama ditemui dalam sebuah beg sandang yang diletakkan bersebelahan dengan beg troli. Kedua-dua beg tersebut berada dalam ruang bagasi sebuah bas ekspres arah selatan di mana kira-kira dinaiki oleh 12 ke 14 penumpang termasuk perayu menaiki apabila bas tersebut dihentikan untuk pemeriksaan D rutin di tol Butterworth oleh pegawai penguatkuasa daripada jabatan polis, kastam, imigresen dan alam sekitar. Adalah merupakan keterangan pendakwa raya bahawa apabila pegawai-pegawai tersebut menaiki bas untuk memeriksa kad identiti dan bagasi penumpang-penumpang dan menghampiri perayu, dia kelihatan resah dan berpeluh dan bahawa tangan kanannya menggeleter. E Perayu mengakui kepada salah seorang pegawai bahawa begnya berada dalam ruang bagasi bas tersebut. Selepas penumpang-penumpang diperintahkan untuk mengeluarkan bagasi mereka daripada ruang tersebut, pegawai-pegawai menyedari bahawa hanya beg troli dan sebuah beg sandang bersebelahannya yang masih di dalam ruang tersebut. Mereka mengeluarkan kedua-dua beg F tersebut dan bertanya kepada perayu sama ada beg tersebut adalah kepunyaannya tetapi dia menafikannya. Carian pegawai polis ke atas perayu mendapati dua kunci di dalam poket seluar perayu yang mana telah membuka mangga beg troli tersebut. Perayu ditangkap dan dia beserta beg-beg yang dirampas dibawa ke balai polis. Pada penutup perbicaraan, Mahkamah Tinggi G menggunakan s 37(d) ADB atas anggapan perayu mempunyai milikan dadah tersebut. Hakim perbicaraan juga bergantung atas s 2 ADB untuk memutuskan bahawa perayu 'membawa' kuantiti dadah yang banyak membuktikan pengedaran memandangkan tiada penjelasan, atau kemungkinan, bahawa dadah tersebut untuk kegunaan peribadi perayu. H Apabila pembelaannya kepada pertuduhan dipanggil, perayu dalam kenyataan tidak bersumpah dari kandang tertuduh menafikan pengetahuan tentang dadah dan menegaskan bahawa kunci-kunci yang didapati daripada poketnya adalah untuk beg sandang yang dibawanya pada masa tersebut. Perayu mengatakan beg-beg tersebut mungkin kepunyaan salah seorang daripada I penumpang-penumpang, tiada antara mereka yang dipanggil sebagai saksi-saksi. Dia mengatakan satu-satunya sebab dia gementar dan bimbang pada masa itu kerana dia telah tinggal melebihi tempoh di Malaysia. Hakim perbicaraan mendapati pembelaan perayu merupakan penafian kosong dan mengambil catatan bahawa dia tidak menjelaskan bagaimana kunci-kunci

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kepada mangga pada beg troli berada padanya. Dalam rayuannya terhadap sabitan dan hukuman, perayu mendakwa bahawa hakim perbicaraan terkhilaf dalam mendapati dia mempunyai milikan, jagaan atau kawalan eksklusif atas dadah tersebut memandangkan semua penumpang-penumpang di dalam bas tersebut juga berada dalam jarak yang sama dengan dadah-dadah itu. Dia menghujahkan bahawa pendakwa raya gagal untuk menunjukkan perkaitan antara dia dan kedua-dua beg tersebut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Perayu memiliki kunci kepada mangga beg troli; sikap dan kelakuannya pada masa tersebut merupakan reaksi yang didorong oleh rasa bersalah — dia gelisah, tangan kanannya menggigil dan dia juga berpeluh. Dia mengakui kepada PW6 bahawa beg-begnya berada dalam ruang bagasi bas tersebut. Itu, melebihi apa-apa yang lain, menyatakan perhubungan di antara dua beg dan perayu. Keseluruhan keterangan dan keadaan yang dirujuk bersama jelas menunjukkan kepada perayu telah mempunyai milikan atas beg troli dan beg sandang itu pada masa material. Hakim perbicaraan bertindak tepat menggunakan s 37(d) ADB untuk menimbulkan satu anggapan boleh disangkal mengenai milikan dan pengetahuan tentang dadah bagi pihak perayu (lihat perenggan 17–18).

(2) Perayu ditangkap dalam tindakan membawa ganja dari satu tempat ke tempat lain. Jumlah ganja yang terlibat lebih banyak daripada apa yang mungkin digunakan untuk kegunaan sendiri; dalam sebarang keadaan perayu tidak pernah mencadangkan dalan pembelaannnya bahawa dadah tersebut untuk kegunaannya sendiri. Dalam ketiadaan sebarang penjelasan yang boleh dipercayai, fakta ini mencukupi untuk membawa kepada inferens yang kukuh bahawa tujuan di mana perayu memiliki dadah adalah untuk mengedarkannya (lihat perenggan 19).

(3) Mahkamah perbicaraan membuat satu dapatan bahawa pihak pendakwa telah membuktikan satu kes prima facie selepas penilaian maksima keterangan. Ini jelas merupakan dapatan berdasarkan keterangan yang disahkan dan kredibiliti saksi-saksi dan kebarangkalian yang wujud mengenai keterangan mereka. Dapatan bahawa pembelaan gagal untuk menimbulkan satu keraguan munasabah atas kes pendakwaan juga dibuat selepas satu penilaian maksimum mengenai kenyataan tidak bersumpah perayu daripada kandang tertuduh terhadap kes pendakwaan. Tiada kesilapan undang-undang dilakukan oleh hakim perbicaraan yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 21–22).]

Notes

For cases on drug trafficking, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2438–2452.

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Cases referred to

Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Mad Rozi bin Che Din v PP [2013] 5 MLJ 38; [2013] 3 AMR 669, CA (refd)
Mohamad bin Yazri b Minhat v PP [2003] 2 MLJ 241, CA (refd)
Ong Ah Guan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), (2)

Appeal from: Criminal Trial No 45–9 of 2011 (High Court, Pulau Pinang)

Harpal Singh Gill (Harpal Singh & Co) for the appellant.
Viknesvaran Purnshatman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] In the High Court, Martin Uchenna ('the appellant'), a Nigerian national was charged and tried on two charges of trafficking in cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s 39B(2) of the same Act.

[2] Both the offences were said to have been committed on 29 August 2010 at around 10.45pm at Tol Sungai Dua Arah Selatan, Sungai Dua, Seberang Perai Utara, Penang. At the material time, the appellant was travelling in an express bus as a paid passenger. The impugned drugs were found in two bags, one locked and the other unlocked, placed in a luggage compartment of the bus travelling from Alor Setar towards south.

[3] The first charge involving 13,920g of cannabis reads:

> Bahawa kamu pada 29/8/2010 jam lebih kurang 10.45 malam di Tol Sungai Dua Arah Selatan, Sungai Dua, di dalam Daerah Seberang Perai Utara di dalam Negeri Pulau Pinang telah mengedar dadah berbahaya iaitu 13,920 gram Cannabis dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 398(2) Akta yang sama.

[4] Whilst the second charge involving 12,867g of cannabis reads:

> Bahawa kamu pada 29/8/2010 jam lebih kurang 10.45 malam di Tol Sungai Dua Arah Selatan, Sungai Dua, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang telah mengedar dadah berbahaya iaitu 12,867 gram Cannabis dan

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dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(2) Akta yang sama.

[5] At the end of the trial, the learned trial judge found the appellant guilty of both the charges, convicted him of the charges and sentenced him to mandatory death sentence. The appellant appealed to this court against the decision. We heard his appeal and we unanimously dismissed it. We now give our reasons.

[6] In brief, the prosecution evidence is as follows. On 29 August 2010 at about 7.45pm, Baharudin bin Haron ('PW4'), an express bus driver and his co-driver, Shahrul Anuar bin Awang ('PW5') started their bus journey from Kuala Perlis to Johor Bahru via Alor Setar. Before leaving Kuala Perils, PW4 had checked the luggage compartment located at the bottom of the bus and found it was empty. At Alor Setar, there were about 12 or 14 passengers boarding the bus including the appellant. The bas then proceeded to Butterworth.

[7] The bus reached the Sungai Dua Toll at about 10.45pm where PW4 saw a roadblock manned by police and customs officers. PW4 stopped the bus by the roadside. Then Yuslizan bin Yusof ('PW6') and Abd Rashid bin Abd Razak ('PW7') who are both customs officers from the Customs Narcotics boarded the bus to check the passengers and their luggage. Both of them checked the identity card of each passenger and the overhead luggage compartment but they did not find anything illegal. PW6 next proceeded towards the appellant who was seated on seat No 18. At that moment, PW6 noticed that the appellant reacted by becoming 'gelabah' (fidgety) and his right hand which was holding a hand phone was 'menggeletar' (shivering) and sweating. PW6 asked the appellant whether he brought along any luggage and the appellant answered that he had bags inside the luggage compartment located below the bus.

[8] After that, PW6 directed all the passengers to alight from the bus to retrieve their respective luggage for checking. As events unfolded, all the bags were taken from the luggage compartment except two blue bags which were still inside the luggage compartment. The customs officers then searched the bags of all the passengers but found nothing incriminating. Seeing the two blue bags still remaining inside the luggage compartment, PW6 asked the appellant whether the bags belonged to him. During the trial, learned counsel for the appellant objected to the question, which was upheld by the learned trial judge. After having searched all the luggage, PW6 directed all the passengers with the exception of the appellant to return to their seats in the bus. The luggage of all these passengers were put back inside the luggage compartment while PW6 himself took out the two blue bags. PW6 placed both the blue bags on the

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ground, one is a trolley bag and the other a backpack. The trolley bag was padlocked while the backpack was not.

[9] Not long after that, ASP Ahmad Dahuri ('PW9') came to the scene and asked the appellant whether the trolley bag and the backpack were his belongings. The appellant denied that they were his bags. PW9 followed up by searching the shirt and trousers worn by the appellant. PW9 found two small padlock keys inside the right front trousers pocket worn by the appellant. PW9 managed to open the padlock of the trolley bag with the keys seized from the appellant. Inside the trolley bag were 15 compressed packages wrapped with transparent plastic suspected to be cannabis, which were covered by two t-shirts on top of them. Next, PW9 examined the backpack and found 14 compressed packages wrapped with transparent plastic also suspected to contain cannabis inside it. After the discovery of the drugs, the appellant and the exhibits were taken back to the Butterworth Police Station.

[10] The compressed packages were subsequently sent to the Chemistry Department for chemical examination and analysis. The contents were later confirmed by the chemist, Sukhairi bin Samsudin ('PW2') to be cannabis as defined in s 2 of the DDA weighing in total 13,920g in respect of the 15 compressed packages ('the first charge') and 12,867g in respect of the 15 compressed packages ('the second charge').

[11] At the end of the prosecution's case, on the basis of the primary evidence adduced by the prosecution which we have summarised above, the learned trial judge made a finding that the appellant had possession presumed under s 37(d) of the DDA. Further, the learned trial judge relied on s 2 of the DDA, which defined 'trafficking' to include the act of 'carrying', to hold that the appellant was trafficking by carrying a large quantity of drugs from Alor Setar by bus to his intended destination in Kuala Lumpur and that the substantial amount of cannabis was not meant for personal consumption but for the purpose of trafficking. For that reason, the learned trial judge held that a prima facie case had been made out against the appellant in respect of the offences charged. The learned trial judge then called upon the appellant to enter his defence.

[12] On being called to make his defence, the appellant elected to give an unsworn statement from the dock as follows:

(1) I am a Nigerian national and I came to Malaysia as a tourist and stayed in Kuala Lumpur with a fellow Nigerian named Chima. I entered Malaysia about 5 months prior to my arrest.

(2) On the day in question i.e. 29/8/2010 I had boarded a bus No. JLJ 3699 in Alor Star at about 9.30pm and was heading for Kuala Lumpur. I had gone to Alor Star earlier to see a friend named David.

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(3) When the said bus came to Butterworth Toll, I was arrested by the police on suspicion for drugs contained in 2 bags placed in luggage compartment of the said bus.

(4) I now say that I did not possessed nor trafficked in the drugs found in those 2 bags. I am a non smoker and my urine test was negative and so was dusting of my finger prints on the bags or elsewhere. In fact, there was no nexus between the bags and me. Indeed, I never even touched or retrieved them. It was the police who retrieved those bags.

(5) Apparently, I was called to enter my defence because police had taken a pair of keys from me and they fitted the pad lock on one of the bags. But so were the keys produced (defence exhibit D29) by my counsel in cross-examination of the investigating officer (PW10), Inspector Muhd Izham bin Abd Talib. The keys in question were for my sling bag which I carried with me at the time of arrest.

(6) If one of the reasons for calling of my defence were the keys, why then, I was ordered to enter defence on the contents of the other bag which was unlocked? I was not shivering, sweating or being restless (gelisah) as suggested by the prosecution witnesses. I was only nervous or anxious because I had overstayed in Malaysia.

(7) Be as it may, I strongly deny the charges against me and say that those bags could have belonged to any of the other passengers (about 12 of them) or anybody else for that matter. The said passengers were never called as witnesses nor offered to me to exclude that possibility.

(8) I was merely in close proximity to the bags just as other passengers were.

(9) I was made to wear trousers and t-shirts (see P22 K, L, M & N) by the police and I had objected to doing of the same as it amounted to a statement after arrest and I had not consented to it. They could have fitted other said passengers but again this possibility was never excluded.

(10) I pray that the charges against me be dismissed and I be set free.

[13] At the conclusion of the whole case, the learned trial judge found that the appellant failed to raise a reasonable doubt on the prosecution case, and as we have indicated earlier, the appellant was convicted of the offences charged and sentenced accordingly.

[14] When this appeal came before us, learned counsel for the appellant submitted that the learned trial judge had committed appealable errors which warrant appellate intervention to reverse the decision. Learned counsel argued that the learned trial judge erred when he failed to realise that there was no exclusive possession, custody or control of the drugs. It was his argument that the prosecution could not show the link between the two bags and the appellant. According to learned counsel, the learned trial judge misdirected himself when he did not appreciate that there was no evidence before him that

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it was the appellant who placed the two bags in question in the luggage compartment of the bus nor was there evidence that the appellant tried to retrieve those bags. By reason of the above, learned counsel submitted that the prosecution had failed to prove a prima facie case and therefore the convictions and sentences should be set aside as they cannot be supported in law.

[15] In this case, the learned trial judge had invoked s 37(d) of the DDA, which provides that any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug, until the contrary is proved, is deemed to have been in possession of such drug and is, until the contrary is proved, deemed to have known the nature such drug. Once, the learned trial judge found that the appellant had custody and control of the trolley bag and the backpack, possession of the cannabis is therefore presumed. This is what the learned trial judge said:

> The accused was found to have in his trousers pocket the keys to the padlock of the trolley bag and one of the keys could open the padlock. By having the padlock keys it shows that the accused was having custody and/or control of the trolley bag, meaning having possession. Although the backpack bag was not padlocked, it was placed next to the trolley bag inside the luggage compartment and the very fact that the accused was occupying seat No. 18 located on the side of the luggage compartment meant that the accused could look down at where the compartment was situated and kept an eye on where the two bags were kept. It also means that the accused was also having custody or/and control of the backpack.
>
> The court finds that the accused had presumed possession under section 37(d) of the Dangerous Drugs Act 1952 (Act 234).

[16] The most important question which we must now ask is whether the learned trial judge was correct in his finding that the appellant had custody of the trolley bag and the backpack in order to activate the possession presumption. Custody means having knowledge of the things whereabouts and power of control over them. The most helpful discussion on the subject of custody is to be found in the judgment of Taylor J in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 as follows:

> 'Custody' means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

[17] So much about the law. Now, from the evidence which we have outlined earlier in the judgment, some important points emerge: firstly, the appellant was in possession of the key to open the padlock of the trolley bag. Secondly, the appellant's demeanour and conduct at the point of time were a

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reaction driven by guilt. He was seen to be in a state of restlessness with his right hand holding a hand phone shivering and he was also sweating, and thirdly, the appellant's admission to PW6 that had his bags kept inside the luggage compartment located below the bus. Given that the appellant at the time he made the statement was not yet under arrest, his admission to PW6 is therefore admissible in evidence (see *Mad Rozi bin Che Din v Public Prosecutor* [2013] 5 MLJ 38; [2013] 3 AMR 669). That, more than anything else, tells us about the nexus between the two bags and the appellant.

[18] In our judgment, the surrounding circumstances of the case and the totality of the evidence, particularly in the evidence that we have highlighted in the above para 17, when taken together irresistibly point to the appellant having custody of the trolley bag and the backpack at the material time. The learned trial judge was for that reason entitled and correct in making such a finding. Now a finding of custody or control of the two bags raises a rebuttable statutory presumption of possession and knowledge of the cannabis on the part of the appellant. In our judgment, the learned trial judge directed himself correctly upon this aspect of law.

[19] It has to be pointed out that the appellant was apprehended in the act of carrying from one place to another cannabis weighing 13,920g ('first charge') and 12,867g ('second charge'), which in our view an amount much larger than was likely to be used for his own consumption. In any event, it was never suggested in the appellant's defence that the cannabis in question were for his own consumption. In the absence of contradiction or in the absence of any credible explanation, in our judgment, this fact was sufficient to lead to a strong inference that the purpose for which the appellant was in possession of the drugs he was carrying was to traffic the offending drugs (see *Ong Ah Guan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241).

[20] It is also clear from a reading of the judgment of the learned trial judge that he had critically appraised the unsworn statement of the appellant to the effect he did not have any knowledge about the cannabis. In this regard, the learned trial judge had this to say:

> The court finds that the accused from the unsworn statement made by the accused from the dock basically amounts to a bare denial of the charge against him.
>
> The accused did not even attempt to explain how the padlock keys to the padlock locking the trolley bag came about to be in his trouser pocket.
>
> His statement contradicted materially from the answer that he had earlier given to PW6 that he had bags kept inside the bus luggage compartment. The answer was given during a routine inspection when the accused was not under arrest. It must be borne in mind that the discovery of the drugs was not based on information

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received. It was a chance arrest when the enforcement team comprising the Police, the Customs, the Department of Environment and the Immigration Department stumbled on the drugs brought along by the accused.

There were only about 12 or 14 passengers on the bus (including the accused) thus the task was made easier for the enforcement team led by PW9 to narrow down to who brought the bags into the luggage compartment of the bus.

The defence also tried to blame the other passengers who could be responsible for bringing the drugs into the compartment but PW6 had given evidence that their luggage had also been searched and nothing illegal was found.

[21] The finding that the prosecution had proved a prima facie case was made after a maximum evaluation of the evidence adduced by the prosecution and tested by counsel on behalf of the appellant. It was clearly a finding based on the tested testimony and credibility of the witnesses and the inherent probabilities of their testimonies. As the appellant was entitled to, he had elected to give an unsworn statement from the dock. The finding that appellant had failed to raise a reasonable doubt on the prosecution case was made after a maximum evaluation of the appellant's unsworn statement from the dock, against the prosecution case. Although such unsworn statement from the dock was given the maximum evaluation that it is entitled to, it remains true that he denied himself the opportunity to offer testimony that can be tested before the court and might have given himself much greater credibility than an unsworn statement from the dock.

[22] As an appellate court, we do not have the advantage of seeing and hearing the prosecution witnesses as the learned trial judge had. It is an established principle of law that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 and *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38). As to the maximum evaluation of the evidence and the reasoning by the learned trial judge as to the inherent probabilities based upon the evidence, we find no error of flaw that warrants appellate intervention.

[23] For all these reasons, we had dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned trial judge upon the appellant.

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Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar